Jurisdictional Statement

NO. 81 6073

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT U.S.

DANNY ANGELO FLUKER

APPELLANT

VS.

THE STATE OF GEORGIA

APPELLEE

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

AMOS R. WORTH

PAUL M. HOFFMAN
Attorneys for Appellant

Suite 208
109 E. Ponce de Leon Ave.
Decatur, Georgia 30030
404 377-0588

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANNY ANGELO FLUKER	:	
APPELLANT	:	NO._____
VS.	:	
THE STATE OF GEORGIA	:	
APPELLEE	:	

A. QUESTION PRESENTED

The sole question presented by this Appeal is whether or not Georgia Code Annotated Section 26-2016, as interpreted by the Supreme Court of Georgia, violates the Equal Protection Clause of the Fourteenth Amendment of the Consititution of the United States of America by providing that different treatment be accorded on the basis of sex, which distinction serves no important governmental objective.

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C. THE OPINION OF THE SUPREME COURT OF GEORGIA IS REPORTED IN THE GEORGIA LAW REPORTER AT 248 GA. 290 (1981).

D. JURISDICTION

The appellant was arrested for Pandering pursuant to Georgia Code Annotated Section 26-2016. Prior to trial, the State Court of Fulton County, Georgia denied appellant's Motion to Dismiss which alleged, among other things, that the Georgia statute denied appellant's right to Equal Protection of the Laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States of America. On an interlocutory appeal, the Supreme Court of Georgia, with one Justice concurring only in the judgment, affirmed the ruling of the trial court on September 24, 1981 and denied appellant's Motion for Rehearing on October 14, 1981.

A Notice of Appeal was timely filed with the Supreme Court of Georgia on January 11, 1982, within the prescribed ninety (90) day period (28 U.S. C.A. 2101 (d); Rule 11.1 Supreme Court Rules). Subparagraph Two of Section 1257 of Title 28 of the United States Code Annotated confers jurisdiction of this Appeal on this Court.

E. APPLICABLE STATUTES

Georgia Code Annotated Section 26-2016 Pandering

A person commits pandering when he solicits a female to perform an act of prostitution, or when he knowingly assembles

females at a fixed place for the purpose of being solicited by others to perform an act of prostitution. (Acts 1968, pp.1249, 1302; 1970, pp. 236, 238.)

Georgia Code Annotated Section 26-2012 Prostitution

A person commits prostitution when he performs or offers or consents to perform an act of sexual intercourse for money. (Acts 1968, pp. 1249, 1301.)

Georgia Code Annotated Section 26-2015 Punishment

A person convicted of any of the offenses enumerated in Section 26-2013 (a)(b)(c)(d)(e), 26-2014 and 26-2016 shall be punished as for a misdemeanor of a high and aggravated nature. A person convicted of the offense enumerated in Section 26-2012 shall be punished as for a misdemeanor. (Acts 1968, pp. 1249, 1303; 1970, pp. 236, 238.)

Georgia Code Annotated Section 27-2506.1 Execution of punishment of a misdemeanor of a high and aggravated nature

One convicted of a misdemeanor of a high and aggravated nature shall be punished by a fine not to exceed $5,000 or by confinement in the county or other jail, county correctional institute, or such other places as counties may provide for maintenance of county prisioners for a term not to exceed 12 months, either a fine or confinement or both. In all cases of a conviction of a misdemeanor of a high and aggravated nature the sentencing court shall retain jurisdiction to amend, modify, alter, suspend or probate sentences imposed hereunder at any time, but in no instance shall a sentence imposed under this section be modified in such a manner as to increase the amount of fine or the term of confinement, or to place a county prisoner under the jurisdiction of the State Board of Corrections. A person sentenced for a misdemeanor of a high and aggravated nature shall be entitled to only four days per month good time allowance. (Acts 1970, pp. 236, 241.)

RACEBASE BOND
SOUTHWORTH CO. U.S.A.

Georgia Code Annotated Section 27-2506 (1065 P.C.)

Misdeameanors, how punished.

Except where otherwise provided, every crime declared to be a misdemeanor shall be punished either:

(a) By a fine not to exceed $1,000 or by confinement in the county or other jail, county correctional institution or such other places as counties may provide for maintenance of county prisoners for a total term not to exceed 12 months, either a fine or confinement or both; or

(b) By confinement under the jurisdiction of the State Board of Corrections in the State penitentiary, in a county correctional institution or such other institutions as the Director of Corrections may direct, for a determinant term of months which shall be more than six months but shall not exceed a total term of 12 months.

(c) Any person adjudicated guilty of a misdemeanor for the first time, who was on the date that the misdemeanor was committed, between the age of 16 and 18 years old, shall be punished by a fine not to exceed $1,000 or confined exclusively under the jurisdiction of the State Board of Corrections for a period not to exceed 12 months: Provided that if subsection (c) does not govern, then any person adjudicated guilty of a misdemeanor shall be punished in accordance with subsections (a) or (b), or any other Georgia law applicable.

Either the punishment provided in (a) or (b), but not both, may be imposed in the discretion of the sentencing judge: Provided, however, that misdemeanor punishment imposed under (a) or (b) may be subject to suspension or probation but the punishment provided in (b) shall not be subject to suspension or probation wholly or partially upon payment of a fine either directly or indirectly: and, Provided, further, that the sentencing courts shall retain jurisdiction to amend, modify,

alter, suspend or probate sentences under (a) at any time but in no instance shall any sentence under (a) be modified in a manner to place a county prisioner under the jurisdiction of the State Board of Corrections.

In all misdemeanor cases in which, upon conviction, a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow such sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge: Provided however, that the judge shall retain plenary control of the prisoner at all times during said sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day shall be counted as serving a full day of the sentence.

A person convicted of a misdemeanor of a high and aggravated nature shall be punished by a fine not to exceed $5,000 or by confinement for a specific term not to exceed 12 months or by both.

In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punishment of a city ordinance involving a traffic offense, with the exception of habitual offenders sentence under section 27-2511, as amended, a judge may impose any one or more of the following sentences.

(a) Re-examination by the Department of Public Safety when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed;

(b) Attendance at, and satisfactory completion of,

a driver improvement course meeting standards approved by the court;

(c) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified;

(d) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. Such condition may include driving with no further violations of this law during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing such acts as may be ordered by the judge.

(e) Any sentence hereunder shall be reported to the Department of Public Safety as prescribed by law.

(Acts 1865-6, p. 233; 1878-9, p. 54; 1908, p. 1119; 1956, pp. 161, 168; 1957, pp. 477, 482; 1964, p. 485; 1970, pp. 236, 241; 1972, p. 600; 1974, pp. 361, 362; 1974, p. 631; 1976, pp. 210, 211, eff. July 1, 1976.)

F. STATEMENT OF THE CASE

Appellant was arrested for violating the Georgia Pandering Statute, codified as Section 20-2016, when he allegedly solicited a female undercover police officer to perform an act of sexual intercouse for money. Prior to trial, appellant filed a written Motion to Dismiss with the trial court contending that: (1) The conduct allegedly committed by appellant is not proscribed in Section 26-2016; and (2) The Pandering Statute violates the Equal Protection Clause of the Constitution of the State of Georgia and the Fourteenth Amendment of the

Constitution of the United States of America by establishing a classification by gender which serves no important governmental objectives.

After a hearing on appellant's Motion to Dismiss, the trial court denied relief, sustaining the statute, but allowed appellant to take the case to the Supreme Court of Georgia on an interlocutory appeal where appellant raised the same issues.

In his original brief to the Supreme Court of Georgia, appellant restricted his constitutional attack to the failure to make the statute gender neutral, but during oral argument (after a comment by one of the Justices of the Supreme Court of Georgia) and in his Motion for Rehearing he raised the concomitant issue of the Georgia statutory scheme which punishes the male buyer of commercialized sex more severely than the female seller without proper justification. The Supreme Court of Georgia affirmed the trial court's ruling and denied his Motion for Rehearing without addressing the problem of disparate punishment under Georgia Code Annotated Section 26-2016 and Section 2012.

G. FEDERAL QUESTIONS ARE SUBSTANTIAL

The gender-based classification in the Georgia Pandering Statute violates the Equal Protection Clause of the Fourteenth Amendment in three ways: (1) It serves no important governmental objective since a gender-neutral statute would be just as effective because those presently protected by the statute do not suffer a disproportionate share of the deleterious consequences of the proscribed conduct; (2) It excludes from the class of potential violators only morally culpable females; and (3) It punishes male buyers of commercialized sex more severely than prostitutes are punished pursuant to the Georgia Prostitution Statute by subjecting them to a greater fine, fewer imprisonment alternatives and less good-time credit.

The Supreme Court of Georgia, relying almost exclusively upon this Court's decision in Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, sustained the statute by finding that the biological differences between men and women allow the legislature to punish only the male. This Court's reasoning in Michael M., supra, however, is inapplicable because in the instant case a gender-neutral statute would not frustrate effective enforcement and preventing illegitimate pregnancy is not a feasible goal of the statute.

While this Court recognized in Michael M., that because females bear disproportionately the deleterious consequences of illegitimate pregnancy and because the risk of its occurrence is a sufficient deterrent to females, punishing males exclusively for illicit sexual intercourse is justified since it serves to equalize the deterrents. The Georgia Pandering Statute, however, prohibits only the solicitation of commercial sex, not the physical act of intercourse. The risk of pregnancy is therefore one step removed from the prohibited conduct and its prevention is not "a plausible purpose of the legislation," Michael M., Id. at 475 n. 10. Innocent members of both sexes are equally vulnerable and embarassed by this type of sexual advance. Since the prohibited conduct is not sexual intercourse, the greater risks that females bear with respect to pregnancy do not sanction the disparate treatment here. This statute is therefore impermissibly underinclusive, excluding innocent male victims who would suffer equally with those presently protected when accosted by a female solicitor.

The Georgia Supreme Court's ruling that appellant had the burden of proving that gender-neutralizing the statute would bring within its scope more violators reveals that the court relied upon "the baggage of sexual stereotypes," Orr v. Orr, 440 U.S. 268, 283 (1979), and the archaic assumption that males

are generally the aggressors to sustain the statute. The only class of females that benefit by the Georgia Statute's gender based classification is that class comprised of female solicitors of commercial sex.

> A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny. Orr v. Orr, Id. at 283.

In response to the State's argument that the statute is an attempt to deter the first step toward the commission of an act of prostitution, with its concomitant problems of unwanted pregnancy, physical harm and venereal disease, two points should be made. First, as has been shown already, pregnancy is not a risk diminished by this statute since innocent females will not accept the financial proposition so they need not worry about these other problems and prostitutes have obviously either discounted the risk of pregnancy, physical injury and venereal disease or protected themselves against their occurrence. The gender based classification in the Pandering statute is thus overinclusive since the protected class includes females who will either never incur the physical, emotional or psychological consequences of an unwanted pregnancy or who ignore their possibility. While the risksassociated with sexual intercourse may deter an otherwise foolish teenager female from engaging in intercouse out of wedlock, they are not deterrents to prostitutes.

Second, if preventing prostitution is a goal of the pandering statute, why is the prostitute subject to a less serious penalty than the male buyer? Compared to a convicted prostitute, Georgia Code Annotated Section 27-2506.1, provides

that appellant, if convicted, will face a maximum fine five times higher, and will be granted no weekend imprisonment possibilities, less good time credit and will be labeled a Panderer (a High and Aggravated Misdemeanor) for buying one sexual favor. This statutory scheme discriminates against males because of an immutable characteristic determined solely by the accident of birth prohibited by this Court's decision in Craig v. Boren, 429, U. S. 190 (1976).

H. CONCLUSION

Appellant submits that the standard of judicial review in cases of this type requires that a gender-based classification bear a substantial relationship to important governmental objectives and that this Appeal brings before this Court substantial federal questions, e.g., whether the statute passes muster under this standard, which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

I. APPENDIX

Copy of Supreme Court Opinion

Copy of Order Denying Motion for Rehearing

Copy of State Court Order

Copy of Notice of Appeal

Copy of Motion to Dismiss

Copy of Brief to Georgia Supreme Court

Copy of Motion for Rehearing

YOU ARE TO NOTIFY
THE DEFENDANT OF THIS
DECISION WITHIN 3 DAYS.

In the Supreme Court of Georgia

Decided: SEP 21 1981

37718. FLUKER v. THE STATE.
37719. TURNER v. THE STATE.

MARSHALL, Justice.

Each appellant was charged with pandering, by soliciting a named female to perform an act of prostitution. Both appellants filed motions to dismiss the accusations on the grounds that they charged them with conduct that does not come within the scope of the pandering statute, and that the pandering statute violates the equal protection clauses of the United States and Georgia Constitutions, Code Ann. §§ 1-815 and 2-203. Their briefs in support of their motions stated that each appellant had offered money to a female for a sexual act to be performed with him, which female was, unbeknown to him, an undercover police officer.

The trial judge certified for immediate review his overruling of the appellants' motions to dismiss, and this court granted their applications for interlocutory appeals. We affirm.

1. Our pandering statute, Code Ann. § 26-2016 (Ga. L. 1968, pp. 1249, 1302; 1970, pp. 236, 238) provides: "A person commits pandering when he solicits a female to perform an act of prostitution, or when he knowingly assembles females at a fixed place for the purpose of being solicited by others to perform an act of prostitution."

The appellants argue that, since there is no statutory penalty in Georgia for the act of a female soliciting a male to engage in sexual activity with her for a fee, the pandering statute -- by making illegal the conduct of a male buyer of commercialized sex from a female -- is an unconstitutional denial of equal protection. They contend that the gender-based statutes that have been upheld (see, e.g., Perini v. State, 245 Ga. 160 (1) (264 SE2d 172)

(1980); Barnes v. State, 244 Ga. 302 (1) (260 SE2d 40) (1979); Lamar v. State, 243 Ga. 401 (254 SE2d 353) (1979)) are predicated upon biological and physiological differences between the sexes, whereas the pandering statute is allegedly based upon the outmoded beliefs that males are more sexually aggressive and that females are more embarrassed by sexual advances. Hence, it is claimed, this gender classification rests only upon "old notions," "archaic and overbroad" generalizations, and "the baggage of sexual stereotypes," prohibited by cases exemplified by Michael M. v. Superior Court of Sonoma County, U. S. (101 SC 1200, 67 LE2d 437) (1981) (statutory rape); Orr v. Orr, 440 U. S. 268 (99 SC 1102, 59 LE2d 306) (1979); Califano v. Goldfarb, 430 U. S. 199 (97 SC 1021, 51 LE2d 270) (1977).

"Underlying these decisions is the principle that a legislature may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.' [Cit.] But because the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact . . . to be treated in law as though they were the same,' [Cit.] this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. [Cits.] As the Court has stated, a legislature may 'provide for the special problems of women.' [Cit.]" Michael M. v. Sonoma County Superior Court, 67 LE2d 437, supra, p. 442.

The pandering statute is one part of a broad statutory scheme that serves important governmental objectives, and this statute is substantially related to the achievement of these objectives. "These include the interest of the public

in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Paris Adult Theatre I v. Slaton, 413 U. S. 49, 58 (93 SC 2628, 37 LE2d 446) (1973).

Our legislature, having determined that prostitution is contrary to the public interests above mentioned, enacted several laws to cover every aspect or stage in the commission of the crime of prostitution. These include laws against sodomy (Code Ann. § 26-2002); solicitation of sodomy (§ 26-2003); fornication (§26-2010); public indecency (§ 26-2011); prostitution (§ 26-2012); pimping (§ 26-2013); keeping a place of prostitution (§ 26-2014); pandering (§ 26-2016); pandering by compulsion (§ 26-2017); and masturbation for hire (§ 26-2021). It is noted that some of these laws are gender-based and others not.

The appellants argue that the gender discrimination of the pandering statute ignores the reality of the alleged existence of male prostitutes. The appellants have the burden of showing the existence of the class -- male prostitutes and female panderers -- claimed to be unjustly favored by the statute. See State v. Gaither, 236 Ga. 497, 499 (244 SE2d 378) (1976). Even proof of such a fact would not support their position that such discrimination is invalid, however. At stake is more than the "embarrassment by sexual advances," to which the appellants allude. As Justice Stewart's concurring opinion in Michael M., 67 LE2d 437, supra, p. 449, points out, "the pregnant unmarried female confronts problems more numerous and more severe than any faced by her male partner. She alone endures the medical risks of pregnancy or abortion. She suffers disproportionately the social, educational, and emotional consequences of pregnancy." Justice Rehnquist observes in Michael M., id.,

p. 445, that "the risk of pregnancy itself constitutes a substantial deterrence to . . . females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes." Moreover, besides the above risks, prostitution exposes the female to risks of physical harm and sexual violence (to which she is more susceptible than are males) and contracting (and consequent transmittal) of venereal disease.

Finally, it is argued that the pandering statute could have been written differently to be gender neutral, and still serve its goals equally well. "The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the . . . [l]egislature is within constitutional limitations . . . That other States may have decided to attack the same problems more broadly, with gender-neutral statutes, does not mean that every State is constitutionally compelled to do so." Michael M., 67 LE2d 437, supra, pp. 445, 450.

Since the above-mentioned undesirable consequences to females and to society in general are for the most part initiated and perpetrated by males, we conclude that the legislature was justified in attacking the problem of prostitution at this particular stage at least (i.e., at its inception) by imposing a sanction on males to deter the first step in the commission of the crime and reduce, if not eliminate, the demand, hence incentive, for the prostitute's illicit services. Accordingly, the statute is not subject to the equal protection attack.

2. The appellants contend that their acts of soliciting a female to perform an act of prostitution with them, rather than with a third party, do not constitute violations of the pandering statute, which, they urge, is intended to

apply only to enlisting females into the "business" of prostitution.

With regard to legislative intent, the Supreme Court noted in Michael M., 67 LE2d 437, supra, p. 443, that "[t]his Court has long recognized that 'inquiries into congressional motives or purposes are a hazardous matter,' [Cits.] and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive. [Cits.] Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex."

Aside from the possible intent of the various legislators who voted for the statute, the wording of the statute itself makes the solicitation to perform but a single act of prostitution a violation. Furthermore, the statute does not specify, as it could have, that the solicitation must be for an act to be performed with another. Indeed, a predecessor to the present statute -- former Code § 26-6201. Soliciting and procuring, a codification of Ga. L. 1918, p. 267 -- was construed to apply to solicitation either in one's own behalf or in behalf of another. Osborne v. State, 92 Ga. App. 518 (88 SE2d 862) (1955).

The appellants cite us to the legislative committee notes to the present Code Ann. §§ 26-2016, 26-2017, to wit: "While the term employed in the sections, pandering, is new to the Georgia law, it is essentially a label employed to cover the many offenses separately covered under § 26-6204 of the former Code.

"The essence of pandering is the recruitment of females into the practice of prostitution . . ."

Former Code Ann. § 26-6204 was a codification of Ga. L. 1943, pp. 568, 570. Under this statute it was an offense to "cause, induce, persuade, encourage, or procure by promise, threat, violence, or by any scheme or device, a female to become a prostitute . . ." See Stone v. State, 76 Ga. App. 96 (2) (45 SE2d 89) (1947); Price v. State, 76 Ga. App. 105 (3) (45 SE2d 96) (1947). Even if the primary emphasis of the present pandering statute is, as the committee notes seem to indicate, upon the recruitment of females into the practice of prostitution, the fact remains, as we have pointed out, that the statute's wording renders one guilty of pandering when he solicits a female to commit an act of prostitution, either for himself or another. Under Code Ann. § 26-2012, a female becomes a prostitute once she has performed, offered, or consented to perform the first act of sexual intercourse for money.

Judgment affirmed. Jordan, C.J., Clarke, Smith and Gregory, JJ., concur. Hill, P.J., concurs in the judgment only.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 10/14/81

The motion for a rehearing was denied today:

Case No. 37718, Fenker v. The State

Hill, P.J., dissents.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA ACCUSATION NO. 217789

VS

Danny Angelo Flaker Pandering

ORDER OF THE COURT

The defendant's Motion to Dismiss heretofore filed in the case, coming on for a hearing and after due consideration thereof, the same is hereby Denied.

Let a copy of this order be mailed to counsel for the defendant by the Solicitor General of this Court.

This, the 17 day of March 19 81.

Richard B. Hamilton

JUDGE, STATE COURT OF
FULTON COUNTY

RECEIVED BY HAND DELIVERY
AND FILED:
1/4/82
Hazel E. Hecford
SUPREME COURT OF GEORGIA

IN THE SUPREME COURT
STATE OF GEORGIA

DANNY ANGELO FLUKER	:	
APPELLANT	:	FILE NO. _____
VS.	:	
THE STATE OF GEORGIA	:	
APPELLEE	:	

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

TO THE CLERK OF THE COURT:

Notice is hereby given of the Appellant DANNY ANGELO FLUKER's appeal to the Supreme Court of the United States from the judgment of this Court dated 24 September 1981, and from the denial of his Motion for Rehearing on 14 October 1981. This Appeal is taken under Section 1257(2) of Title 28 United States Code.

This 5th day of January, 1982.

AMOS R. WORTH
Counsel for Appellant
DANNY ANGELO FLUKER

IN THE SUPREME COURT

STATE OF GEORGIA

DANNY ANGELO FLUKER	:	
APPELLANT	:	FILE NO._____
VS.	:	
THE STATE OF GEORGIA	:	
APPELLEE	:	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Section 6-1004 of the Code of Georgia, Appellant DANNY ANGELO FLUKER, asks leave to file the attached Appeal to the Supreme Court of the United States without pre-payment of costs and to proceed in forma pauperis. The Appellant's Affidavit in support of this Motion is attached hereto.

This 5 day of January, 1982.

AMOS H. WORTH
Counsel for the Petitioner

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

IN THE SUPREME COURT

STATE OF GEORGIA

DANNY ANGELO FLUKER	:	
APPELLANT	:	FILE NO. _____
VS.	:	
THE STATE OF GEORGIA	:	
APPELLEE	:	

AFFIDAVIT IN FORMA PAUPERIS
TO RELIEVE FROM COSTS

Personally appeared before me, DANNY ANGELO FLUKER, Appellant in the Notice of Appeal filed in the above stated case and on oath he is, because of his poverty unable to pay the costs of said case. This Affidavit is executed pursuant to Section 6-1004 of the Code of Georgia to relieve affiant of costs.

Danny Angelo Fluker
DANNY ANGELO FLUKER

Sworn to and subscribed before me
this 5th day of January, 1982.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Affidavit in Forma Pauperis to Relieve from Costs and Notice of Appeal to the Supreme Court of the United States upon counsel of record for all parties in the above styled case by mailing same in the properly addressed envelope in the United States Mail with sufficient postage affixed thereon to:

Michael Bowers, Esq.
U. S. Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Hinson McAuliffe, Esq.
Solicitor
State Court Fulton County
160 Pryor Street, S. W.
Atlanta, Georgia 30303

This 11 day of January, 1982.

AMOS R. WORTH
Attorney for Appellant

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

IN THE STATE COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

STATE OF GEORGIA	:	CASE NO. 217789
VS.	:	
DANNY FLUKER	:	

MOTION TO DISMISS

Now comes the defendant in the above-captioned action and moves this Court to dismiss the charge of pandering against him and shows in support of this Motion the following:

1.

Defendant is charged with the offense of Pandering as defined by Georgia Acts 1970, pp. 236, 238 codified as Georgia Code Annotated Section 26-2016.

2.

The accusations charging defendant with Pandering describes conduct that does not fall within the scope of Georgia Code Annotated Section 26-2016.

3.

Georgia Code Annotated Section 26-2016 (Acts 1970, pp. 236, 238) violates Article XIV of the Constitution of the United States which provides for equal protection of the laws and Article I, Section II, Paragraph III of the Constitution of the State of Georgia codified as Georgia Code Annotated Section 2-203 which provides for impartial protection to person and property of its citizens.

WHEREFORE, defendant prays this Court dismiss the accusation against him.

FILED IN OFFICE THIS THE
FEB - 2 1981

Jerry W. Ohmer
Deputy Clerk

Respectfully submitted,

AMOS R. WORTH
Attorney for Defendant

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

IN THE SUPREME COURT

STATE OF GEORGIA

DANNY ANGELO FLUKER

APPELLANT

VS.

THE STATE OF GEORGIA

APPELLEE

CASE NO. 37718

BRIEF FOR APPELLANT

Amos R. Worth
Attorney for Appellant
Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

IN THE SUPREME COURT STATE OF GEORGIA

DANNY ANGELO FLUKER	:	
APPELLANT	:	CASE NO. 37718
vs.	:	
THE STATE OF GEORGIA	:	
APPELLEE	:	

PART ONE

JURISDICTION

This Court has jurisdiction because the Constitutionality of a Georgia Law (Acts 1970, pp. 236, 238) has been called into question by this Appeal. According to the State, this law (codified as Georgia Code Annotated Section 26-2016) penalizes the conduct Appellant allegedly committed, i.e., soliciting a female to have sexual intercourse with him for money. The Constitutionality of the statute is challenged by Appellant in that the act of a female soliciting a male to have sexual intercourse with her for money is not proscribed, thus providing that different treatment be accorded on the basis of sex, thereby establishing a classification subject to scrutiny under the Equal Protection Clause.

The other ground of this Appeal which falls within the ancillary jurisdiction of this Court concerns the proper construction of the statute. Appellant contends that the statute was only intended to prohibit one from enlisting females as prostitutes or assembling prostitutes for solicitation by others. A ruling by this Court that the conduct of the Appellant does not fall within the ambit of Georgia Code Annotated Section 20-2016 might render the statute constitutional since the State might have a valid interest in protecting females against those who prey on unemployed women by enticing them into commercialized sex as a source of income.

PART TWO

STATEMENT OF THE CASE

This is an appeal from an order entered on March 17, 1981 by the State Court of Fulton County, Nick D. Lambros presiding, denying Appellant's motion to dismiss (R-12) Appellant obtained a Certificate of Immediate Review on March 25, 1981 (R-34), and this Court granted Appellant's application for interlocutory appeal on April 15, 1981 and Appellant filed his Notice of Appeal on April 24, 1981 (R-1, 2).

PART THREE

ISSUES PRESENTED

This Appeal raises two issues:

(1) Whether making illegal the conduct of a male buyer of commercialized sex from a female and not making illegal the conduct of a female buyer of commercialized sex from a male denies Appellant of Equal Protection under the laws of the United States and the laws of Georgia (Enumeration of Error Number 1).

(2) Whether Georgia Code Annotated Section 20-2016 makes criminal the conduct of a buyer of commercialized sex directly from a prostitute (Enumeration of Error Number 2).

PART FOUR

STATEMENT OF THE MATERIAL FACTS

The facts as stipulated show that the State alleges Appellant offered money to a female, who was actually an undercover police officer, for a sexual act to be performed with him (R-15, 16).

PART FIVE

ENUMERATION OF ERROR

(1) If this Court adopts the construction urged by the State, i.e., that Code Annotated Section 20-2016 criminalizes the conduct of a male buyer of commercialized sex from a female, then the statute violates Article I, Section II, Paragraph III of the Constitution of the State of Georgia codified as Section 2-203 and Article XIV of the Constitution of the United States since it would then provide that different treatment be accorded on the basis of sex which cannot withstand the scrutiny mandated by the Constitution of the State of Georgia or the Consitution of the United States, and the trial court erred in not so finding

(2) The trial court erred in denying appellant's Motion to Dismiss since the conduct Appellant is alleged to have committed is not prohibited by Georgia Code Annotated Section 20-2016 or any other Georgia law.

PART SIX

ARGUMENT AND CITATION OF AUTHORITY.

1.

The Constitution of the State of Georgia, Article I, Section II, Paragraph III, provides that all of its citizens must be afforded Equal Protection of the laws. The Constitution of the United States has a similar provision, Article XIV.

Georgia Acts 1970, pp, 236, 238 is a statute which denies equal protection to all of the citizens of Georgia. The State of Georgia has a valid interest in restricting or curtailing the undesirable solicitation of sexual activity in public, but must do so without discriminating against someone because of an immutable characteristic determined solely by the accident of birth, such as gender. Craig v. Boren, 97 S.Ct. 451 (1976). "A gender based classification...must 'serve important governmental objectives' to withstand scrutiny under the equal protection clause." Perini v. The State, 245 Ga. 160, 264 S.E.2d 172, 173 (1980). Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 (1979). Further "a classification by gender 'must be reasonable, not arbitary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Lamar v. The State, 243 Ga. 401, 254 S.E.2d 353, 355 (1979) Reed v. Reed, 404 U.S. 71,

76, 92 S.Ct. 251, 254 (1971).

In Perini v. The State, supra the statute being scrutinized was the Georgia abandonment statute, Code Annotated Section 74-9902. This Court upheld that law although it only required the father to suffer a criminal penalty if he fails to pay the reasonable medical expenses of childbirth because "the only contribution to the birth the father can make is monetary... and is in a much better position to pay the expenses" Id at 173. Thus this Court found that the abandonment statute was based on the biological and physiological differences between males and females, recognizing that the woman was incapacitated at the time when these expenses are incurred.

In Lamar v. The State, supra, this Court considered the rape statute which punishes men when they forcibly have sex with females but provides no sanction for the "rape" of men. Again, this Court recognized the physiological difference between the sexes and found the classification bore a fair and substantial relation to the object of the legislation since a rape affects a female in ways a male cannot be affected, e.g., physical injury and possible pregnancy.

In another case, Barnes v. The State, 244 Ga. 302, 260 S.E.2d 40 (1979) the statutory rape law of Georgia was upheld. This Court found that since penalties for a female engaging in

sexual activity with a male child of less than fourteen years of age is subjected to the same penalties as a male committing statutory rape, the general statutory scheme providing protection to both male and female children and penalizing both male and female offenders equally, although punished under separate statutes, saves the statute from an equal protection challenge.

These three cases illustrate the very elements of the Pandering Statute which cause it to be unconstitutional. Unlike the rape statute and the abandonment statute, pregnancy and physical injury are not the results intended to be prevented by the Pandering Statute. Solicitation, the conduct the State urges Code Annotated Section 20-2016 proscribes, is an act equally available to both sexes and to which both sexes are equally vulnerable. It is just as embarrassing for a man to be approached by a prospective female buyer as it is for a woman to be so badgered.

The Georgia Pandering Statute is also not a part of a comprehensive statutory scheme as this Court found in Barnes v. The State, supra or as the Supreme Court of the United States found in Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200 (1981). A male soliciting another male to commit a sexual act in Georgia is guilty of solicitation of Sodomy (Code Annotated Section 20-2003) as is a woman who solicits another woman. However, there is not statutory penalty for the act of a female soliciting a male

to engage in sexual activity with her for a fee. Unlike the case of The State v. Gaither, 236 Ga. 497, 274 S.E.2d 378 (1976) where there was data showing that the Atlanta Police Department received many complaints about female prostitutes but not about male prostitutes, there is no evidence here that female solicitors do not exist in significant numbers.

Thus, the gender classification in the Georgia Pandering Statute rests on 'the baggage of sexual stereotypes' Michael M. v. Superior Court of Sonoma County, supra; Orr v. Orr, supra based on the assumption that males are generally the aggressors. This statute is therefore impermissibly underinclusive since the State's "purposes are as well served by a gender-neutral classification as one that gender-classifies" Orr v. Orr, supra. The State can not successfully contend as did California that a gender-neutral statute would frustrate effective enforcement, Michael, supra at 1206.

The Georgia Pandering Statute is not based upon biological or physiological differences between males and females which the Constitution of the State of Georgia or the Constitution of the United States recognize but upon an outdated belief that males are more sexually aggressive and females more embarrassed by sexual advances. It is the innocent citizen subjected to unsolicited sexual remarks who is sought to be protected by the Pandering Statute, if the State's construction is correct, and males can be just as intimidated by

such conduct as females;while females may be more susceptible to sexual violence than are males, women are not biologically or physically more susceptible to sexual advances than are men.

The Georgia Prostitution Statute is gender neutral, i.e., it criminalizes both male and female prostitution. The Pandering Statute could be so written as well without harming its effectiveness.

2.

Georgia Code Section 26-2016 states:

> A person commits pandering when he solicits a female to perform an act of prostitution, or when he knowingly assembles females at a fixed place for the purpose of being solicited by others to perform an act of prostitution. (Acts 1970 pp. 236, 238).

The statute from which this law originated, Georgia Code Annotated Section 26-6204 (Acts 1918), stated:

> Any person who shall cause, induce, persuade, encourage, or procure by promise, threat, violence, or by any scheme or device, a female to become a prostitute or to become or remain an inmate of a house of prostitution; or who shall induce, persuade, or encourage a female to come into or leave this state for the purpose of prostitution, or to become

an inmate in a house of prostitution; or who shall receive or give, or agree to receive or give any money or thing of value for procuring, or attempting to procure any female to become a prostitute or an inmate for a house of prostitution; or who shall knowingly accept, receive levy, or appropriate any money or other thing of value without consideration from a prostitute or from the proceeds of any woman engaged in prostitution; or who shall aid, abet, or participate in the doing of any acts herein prohibited, shall, upon conviction for the first offense under this law (Sections 26-6203 to 26-6206) be punished as for a misdemeanor and upon conviction for any subsequent offense thereunder shall be punished as for a felony by imprisonment in the penitentiary for a period of not less than one year nor more than three years. (Acts 1943, pp. 568, 570.)

The legislative committee notes state that the current Pandering Statute was not intended to criminalize conduct not already made criminal by Section 26-6204 but that:

The separation of the offenses of prostitution

(§26-2012), pimping (§26-2013), pandering (§26-2016), and keeping a place of prostitution (§26-2014) make the purpose of the law more understandable and minor changes in terminology have been included for the sake of clarity alone.

The notes further state:

26-2016. Pandering and 26-2017. Pandering by Complusion. While the term employed in the sections, pandering, is new to the Georgia law, it is essentially a label employed to cover the many offenses separately covered under §26-6204 of the former Code.

The essence of pandering is the recruitment of females into the practice of prostitution. The gravity of the offense rests on whether such recruitment was accomplished with or without force or duress. For this reason the new law distinguishes between pandering, which is mere solicition and treated under the new law as a misdemeanor, and pandering by compulsion, which requires duress or coercion as well as an act of prostitution resulting from such coercion or duress. The latter offense,

formerly punished on first prosecution as a misdemeanor and for subsequent offenses as a felony with one to three years imprisonment punishment, is under the new law treated as a felony punishable for one to 10 years imprisonment. (Emphasis supplied.)

If the statute is given the construction the State urges, then Pandering by Complusion becomes meaningless since it states:

A person commits pandering by complusion when he by duress or coercion causes a female to perform an act of prostitution and upon conviction shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249, 1302). Georgia Code Annotated Section 26-2017.

How can one force someone to take money to have sex with him? The State's construction clearly is erroneous as what was clearly meant to be proscribed by Section 26-2017 was the recruitment of a female into the practice of prostitution by duress.

The Court of Appeals of the State of Georgia ruled in the case of State of Georgia v. Gaither, et al, 236 Ga. 497, 224 S.E.2d 378 (1976) that the prostitution statute, Georgia Code Annotated Section 26-2012, is applicable only to sellers of sexual intercourse for money. In a special concurring opinion Justice

Hill frankly remarked that the Georgia Legislature has not criminalized the conduct of the buyer of commercialized sex. (Id. at 379).

Attorney for Appellant was asked by the trial judge in his Motion to Dismiss concerning the distinction between the Pandering Statute (Code Annotated Section 20-2016) and the Pimping Statute (Code Annotated Section 20-2013). Appellant's attorney incorrectly stated the difference but now wishes to make the proper distriction (R-12, 13). The Pandering Statute (as construed by the Appellant is aimed at those, either male or female, who solicit others to become prostitutes or assemble prostitutes for the purpose of being solicited by others. The Pimping Statute criminalizes the conduct of one who solicits for a prostitute or receives money from a prostitute for her services or any other way abets an act of prostitution. The difference between the two statutes then is that a panderer enlists females into the "business" of prostitution or assembles them to be solicited by others while a pimp is one who lives off that business or deals with the public soliciting on behalf of his prostitutes.

Respectfully submitted,

AMOS R. WORTH
Attorney for Appellant

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Brief of Appellant upon counsel of record for all parties in the above styled case by mailing same in the properly addressed envelope in the United States Mail with sufficient postage affixed thereon to:

George Weaver, Esq.
Assistant Solicitor
State Court Fulton County
160 Pryor Street, S. W.
Atlanta, Georgia 30303

This 14 day of July, 1981.

AMOS R. WORTH
Attorney for Appellant

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

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AND FILED:

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HEH

SUPREME COURT OF GEORGIA

IN THE SUPREME COURT

STATE OF GEORGIA

DANNY ANGELO FLUKER and	:	
JOEL TURNER	:	
APPELLANTS	:	CASE NOS. 37718
VS.	:	37719
THE STATE OF GEORGIA	:	
APPELLEE	:	

MOTION FOR REHEARING

Now come the Appellants DANNY ANGELO FLUKER and JOEL TURNER who move the Court to rehear this case for the following reasons:

(a) The Court failed in its decision of 24 September 1981 to address the question of calling the mere solicitation of a female to commit an act of prostitution, pandering when in fact the word pandering as commonly understood and as defined in the various dictionaries means a pimp or procurer. Black's Law Dictionary is quoted as follows:

> "To pimp; to cater to the gratification of the lust of another. State v. Thibodeaux, 136 La. 935, 67 So. 973, 974. To entice or procure a female, by promises, threats, fraud, or artifice, to enter any place in which prostitution is practiced, for the purpose of prostitution. Boyle v. State, 110 Ark. 318, 161 S.W. 1094, 1051; Crawford & Moses' Dig. Section 2707; Humphries v. State, 79 Tex. Cr. R. 637, 186 S.W. 332, 334; To take and detain a female

for the purpose of sexual intercourse, or pretense of marriage. Crawford & Moses' Dig. (Ark.) Section 2703."

Neither the legislature nor the Courts have the authority to change the English language.

(b) It is a matter of great and continuing consequence to those persons who are convicted under charges brought under the allegations stipulated in this case. Consider the following definitions quoted in toto from WORDS AND PHRASES, Permanent Edition, Vol. 31 at pages 47-49.

"PANDERER

A "panderer" is one who solicits for prostitute or lewd woman. Lutes v. Commonwealth, 33 S.W.2d 620, 622, 236 Ky. 546, 74 A.L.R. 304.

According to common understanding, a "panderer" is one who ministers to the evil passions of others, a procurer. People v. Smith, 224 N.W. 402, 403, 246 Mich. 393.

PANDERING

One negotiating with third person to procure a female to be inmate of house of prostitution is guilty of pandering, under St.1911, p. 9. People v. Tarres, 227 P. 177, 178, 193 Cal. 730.

Payment of earnings from prostitution without lawful consideration to a third person for defendant at his direction or request is sufficient to constitute offense of "pandering", and defendant need not receive such earnings directly from the prostitute. Harris v. Com.,Ky., 285 S.W.2d 489, 492.

"Pandering" is more than merely allowing prostitution and mere operation of a bawdy house does not constitute pandering. Com. v. Schettino, 114 A.2d 224, 227, 178 Pa.Super. 281.

As synonymous with "pimping", unlawfully procuring female to engage in gratifying lust of other individuals. State v. Hart, 146 P.2d 211, 213, 61 Ariz. 191.

"Pandering" is established when evidence shows that accused has succeeded in inducing his victim to become an inmate of a house of prostitution. People v. Mitchell, 205 P.2d 101, 104, 91 Cal. App. 2d 214.

Offense of inducing prostitute to enter bawdy house. 18 P.S. Sections 4513, 4517. Commonwealth v. Spallone, 35 A.2d 731, 732, 154 Pa. Super. 290.

A "pander" is one who caters for the lust of others, a male bawd, a pimp or procurer, and "pandering" is catering for the gratification or lust of another. State v. Basden, 196 P.2d 308, 313, 31 Wash. 2d 63.

Accused, who suggested to young women that they indulge in sexual intercouse for hire, was guilty of "pandering", though he limited solicitation to intercouse with one man on each occasion and though solicitations were unsuccessful. 18 P.S. Sections 4103, 4513. Commonwealth v. Stingel, 40 A.2d 140, 141, 156 Pa. Super. 159.

Under pandering statute, it is immaterial whether female procured is an innocent girl or a

hardened prostitute, nor whether procurement was at her request or upon defendant's own initiative, since in either case defendant has "procured" a female within meaning of statute and is guilty of "pandering." Gen. Laws 1937, Act 1906, Section 1. People v. Montgomery, 117 P.2d, 437, 445, 447, 450, 451, 47 Cal. App. 2d 1.

In pandering prosecution, instruction that under statute if evidence disclosed that defendant acceded to importunities of a wanton woman and at her request found her a place in a house of prostitution, defendant was just as guilty of offense of "pandering" as though he had induced her to become such an inmate by means of threats, violence or fraud was proper. Gen. Laws 1937, Act 1906, Section 1. People v. Montgomery, 117 P.2d 437, 445, 447, 450, 451, 47 Cal. App. 2d 1.

The crime of "pandering" does not necessarily involve question of specific intent, since under statute the only intent required is that act be voluntarily done or performed by person charged with full knowledge of its nature, and any one who knowingly takes part in evil practice condemned is guilty of violation of the law regardless of state of his mind with relation to act involved. Gen. Laws 1937, Act 1906. People v. Montgomery, 117 P.2d 437, 445, 447, 450, 451, 47 Cal. App. 2d 1.

Requested instructions on theory that to be found guilty of pandering it must be shown that defendants were acting for a house of

prostitution in capacity of an agent therefor were properly refused, since under pandering statute agency for house of prostitution is not an essential element of "pandering." Gen. Laws 1937, Act. 1906. People v. Montgomery, 117 P.2d 437, 445, 447, 450, 451, 47 Cal. App. 2d 1.

Evidence that accused knowingly permitted a girl to work for accused as a prostitute in accused's houses of prostitution showed that accused was guilty of "pandering" for having "procured" such female as an inmate of house of prostitution. Gen. Laws 1937, Act 1906. People v. Montgomery, 117 P.2d 437, 445, 447, 450, 451, 47 Cal. App. 2d 1.

The commission of any one of acts enumerated in pandering statute constitutes by itself the offense of "pandering" but it does not follow that a defendant may not be guilty of having committed more than one of enumerated acts in a single transaction, or that the description of one enumerated act may not in a proper instance be applied to another. Gen. Laws 1937, Act 1906. People v. Montgomery, 117 P.2d 437, 445, 447, 451, 47 Cal. App. 2d 1.

Evidence held sufficient to support conviction for "pandering." Deering's Gen. Laws 1931, Act 1906. "Pandering" is synonym of term "pimping," and consists of unlawfully procuring female to engage in gratifying lust of other individuals. People v. Cimar, 15 P.2d 166, 127 Cal. App. 9.

The crime of "pandering" is sufficiently established by proof of conduct of defendant which assisted, induced, persuaded, or encouraged a female to become an inmate of a house of ill fame for the purpose of practicing prostitution. St. 1911, p. 9. People v. Wright, 79 P2d 102, 105, 26 C.A.2d 197.

In prosecution for violating local option laws, it was improper to ask accused whether he had been charged with pandering, where the result of the examination as to such matter showed that he had been arrested for being found in a room with a woman, which does not constitute pandering. Wrenn v. State, 200 S.W. 397, 82 Tex. Cr.R.608.

Crawford & Moses' Dig. Section 2703, defining pandering as taking and detaining female for purpose of sexual intercouse, on "pretense of marriage," contemplates fictitious, fraudulent, or pretended marriage, not promise of marriage in future, and does not authorize conviction of one promising marriage if he secured divorce. Almond v. State, 264 S.W. 937, 165 Ark. 419.

Under the statute, Acts 32d Leg. c. 23, providing that any person who shall procure, or attempt to procure, or be concerned in procuring, with or without her consent, a female for a house of prostitution, etc., shall be guilty of pandering, it makes no difference whether the female at the time is a virtuous

woman or a prostitute. Humphries v. State, 186 S.W. 332, 334, 79 Tex.Cr.R. 637.

The term "pandering" used to define the offense created by Acts 32d Leg. c. 23, means, and is limited to, the procuring of a female to become an inmate of a house of ill fame or to prostitute her body to other men; the term "pander" meaning one who caters to the lust of others, a male bawd, a pimp, or procurer, the offense not being established by proof of illicit intercourse between the female and the alleged panderer. Hewitt v. State, 158 S.W. 1120, 1125, 71 Tex.Cr.R. 243.

"Prostitution," within Act June 7, 1911, P.L. 698, 18 P.S. Section 807 et seq., providing that any one procuring or enticing a female to become an inmate of a house of prostitution, or to enter for the purpose of prostitution any place where prostitution is practiced, encouraged, or allowed, shall be guilty of pandering, is not mere fornication or adultery, confined to any one man, but indiscriminate illicit intercourse. Commonwealth v. Lavery, 93 A. 276, 277, 247 Pa. 119.

One who transports unmarried female across the state to subject her to indiscriminate lewdness is guilty of pandering, though he indulged in only one act of illicit intercourse with her; his intention being the controlling thing, within Crawford & Moses' Dig. Section 2707, defining the crime, though "prostitution" means a state of

existence for that purpose and does not include merely the act of a woman occupying the relation of concubinage with one man. Younger v. State, 255 S.W.294, 295, 160 Ark. 557.

The statute making any person who, by promises, threats, fraud, or artifice, entices or procures any female to enter any place in which prostitution is practiced for the purpose of prostitution guilty of pandering prohibits the procuring of females for the purpose of prostitution, and the question whether any female procured was virtuous or not is immaterial, and one taking a female to a place where prostitution is practiced for the purpose of prostitution is guilty, whether she went voluntarily or not. Boyle v. State, 161 S.W. 1049, 1051, 110 Ark. 318.

Act No. 307 of 1910, entitled "An act in relation to pandering, to define and prohibit the same, to provide for the punishment thereof, and for the competency of certain evidence at the trial thereof," deals only with the subject of pandering, vulgarly called "pimping," defined in the dictionaries as catering for the gratification or lust of another. Hence the statute cannot be construed to embrace other immoral acts, without, to that extent, rendering it violative of the constitutional provision that a statute shall embrace but one object, and that shall be expressed in its title. State v. Thibodeaux, 67 So. 973, 974, 136 La. 935.

> Under Pen. Code 1911, art. 3, Vernon's Ann. P.C. art. 3, forbidding punishment of any act or omission not made a penal offense by written law, and under Acts 32d Leg. c. 23, defining the offense of pandering as committed by "any person who shall by fraud or artifice or by duress of person,...or by abuse of... confidence, procure any female person to become an inmate of a house of ill fame, or to enter any place in which prostitution is...allowed," an indictment charging that defendant by fraud, etc., and by abuse of confidence, etc., did ... procure and induce...the said female to submit her body and person to men for the purpose of prostitution, is insufficient to sustain a conviction, as failing to allege that the woman was induced to remain in or enter a house of prostitution. Houseman v. State, 473 S.W. 1016, 76 Tex.Cr.R. 212."

There are over forty cases cited. All show some aspect of this crime in which the perpetrator induces or procures prostitutes for the use of another. As a result of the decision in the case at bar, we in Georgia obviously stand alone and in effect say that it does not matter what you name the crime. It simply is a question of including the essential elements of the offense in a statute under which the offense is charged. Further it does not matter that the particular offense is completely inconsistent with the other provisions of the statute which describe the offense.

To further illustrate the incongruity of this decision compare some of the other crimes for which certain charges are brought against the dealers or manufacturers as opposed to charges against the users. For example would you charge the bootlegger and the person apprehended drinking moonshine with a violation of the bootlegging statute? And justify your action in the case on the basis that both persons committed a crime involving "moonshine" and besides say that there was no point in trying to distinguish between the two since both were bad for society and it did not matter that the two persons were subject to equal punishment. For example would you charge the narcotics dealer, the "pusher," and the person apprehended smoking a marijuana cigarette with a violation of the narcotics dealer statute? And again justify your action on the basis that both persons committed a crime involving narcotics and again say that there was no point in trying to distinguish between the two since narcotics were bad for society and it did not matter that the user and the dealer were subject to the same punishment.

In spite of the foregoing, the Court may say, the punishment is up to the trial court. There, the judge can take whatever he needs to take into consideration when he fixes the sentence. So much is true but the most important aspect of this case is the fact that a conviction under the stipulated allegations which show clearly only the solicitation, results in a criminal record for "PANDERING," a crime which in no way fits the specifications given.

In this instance the state has taken a pandering statute which has as its gravamen, the acquisition and management of prostitutes and included a totally different offense, the solicitation of sex by a mere purchaser. However weak and

foolish these purchasers may be they do not deserve to bear the stigma of panderer, or pimps which is synomous, for the rest of their lives. This Court has simply failed to recognize the urfairness and the utterly devastating consequences that a pandering record will have on these people.

(c) In its opinion dated September 24, 1981, this Court also failed to note the irreconcilable conflict between its decision concerning the scope of Georgia Code Annotated Section 26-2016 and the clear language of Georgia Code Annotated Section 26-2015. In effect, this Court has held that a female seller of commercialized sex is guilty of only a misdemeanor while a male buyer of commercialized sex is guilty of a misdemeanor of a high and aggravated nature which carries a greater penalty. It is difficult to understand why the legislature would penalize the male buyer, who perhaps is a one-time offender, more than the female seller, who, in all probability, is a habitual offender and is therefore more of a hazard to the public welfare than the one-time male buyer.

Furthermore, this Court's interpretation of Georgia Code Annotated Section 26-2016 causes the gender based discrimination already assailed by Appellants to be even more invidious, as it not only punishes male offenders exclusively, but under Georgia Code Annotated Section 26-2015 punishes those male offenders more severely than the at least as culpable female sellers. This point was made in oral argument before this Court by Appellants.

Although determining legislative intent is often an elusive goal, all four indicia of that intent militate against this Court's ruling, i.e.:

(1) The meaning of the word "Pandering"

(2) The legislative committee notes

(3) The effect of Georgia Code Annotated Section 26-2017 when read in pari materia with Georgia Code Annotated Section 26-2016; and

(4) The harsher punishment mandated by the legislature for Pandering which is justified for the male recruiter but not the male buyer.

(d) Appellants therefore respectfully request this Court to reconsider its prior holding and reverse the trial Court's denial of Appellants' Motion to Dismiss the Accusations.

Respectfully submitted,

AMOS R. WORTH
Attorney for DANNY FULKER
Case No. 37718

PAUL M. HOFFMAN
Attorney for JOEL TURNER
Case No. 37719

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

CERTIFICATE OF SERVICE

We hereby certify that we have this date served a copy of the foregoing Motion for Rehearing upon counsel of record for all parties in the above styled case by mailing same in the properly addressed envelope in the United States Mail with sufficient postage affixed thereon to:

Hinson McAuliffe
Solicitor General
State Court of Fulton County

Paul C. McCommon, III
Assistant Solicitor General
State Court of Fulton County
53 State Court Building
160 Pryor Street, S. W.
Atlanta, Georgia 30303

This 5th day of October, 1981.

AMOS R. WORTH
Attorney for Danny Angelo Fluker

PAUL M. HOFFMAN
Attorney for Joel Turner

Suite 208
108 E. Ponce de Leon Ave.
Decatur, Georgia 30030
377-0588

Motion to Dismiss or Affirm

NO. 81-6073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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DANNY ANGELO FLUKER,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION TO DISMISS

CHARLES E. BROWN
Assistant Attorney General

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

CHARLES E. BROWN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-2976

NO. 81-6073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANNY ANGELO FLUKER,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION TO DISMISS

The Appellee in the above entitled case moves to dismiss the appeal herein from the judgment of the Supreme Court of Georgia in Fluker v. State, 248 Ga. 290 (1981) as the question presented is so unsubstantial as not to need further argument.

I.

STATEMENT OF THE CASE

This appeal results from the Appellant's arrest for violating the Georgia pandering statute, Ga. Laws 1968, pp. 1249, 1302; 1970, pp. 236, 238, [Ga. Code Ann. § 26-2016] which provides: "A person commits pandering when he solicits a female to perform an act of prostitution, or when he knowingly assembles females at a fixed place for the purpose of being solicited by others to perform an act of prostitution."

In the trial court Appellant filed a Motion to Dismiss the accusation on the grounds that the conduct charged did not come within the scope of the pandering statute, and that the pandering statute violated the Equal Protection Clause of the United States and Georgia Constitutions. The trial court denied the Appellant's motion and certified for immediate review by the Supreme Court of Georgia the Appellant's challenge to the statute.

In the Supreme Court of Georgia the Appellant contended that since there is no statutory penalty in Georgia for the act of a female soliciting a male to engage in sexual activity with her for a fee, the pandering statute by making illegal the conduct of a male buyer of sex from a female is an unconstitutional denial of equal protection.

The Supreme Court of Georgia found that the pandering statute is only one part of a broad statutory scheme that serves important governmental objectives, and that the statute is substantially related to the achievement of these objectives. The Supreme Court of Georgia found that the pandering statute is aimed at eliminating the demand or market for a prostitute's illicit services by imposing a sanction on males to deter the first step in the commission of the crime, and therefore the statute is not subject to an attack on equal protection grounds.

II.

ARGUMENT

A. THE QUESTION RAISED BY THIS APPEAL IS SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The Appellant contends that the Georgia pandering statute, Ga. Laws 1968, pp. 1249, 1302; 1970, pp. 236, 238 [Ga. Code Ann. § 26-2016] violates the Equal Protection Clause of the Fourteenth Amendment by providing that different treatment be accorded on the basis of sex which Appellant contends serves no important governmental objective. Also, Appellant now for the first time upon appeal to this Court seeks to attack the pandering statute on the ground that it "punishes male buyers of commercialized sex more severly than prostitutes are punished pursuant to the Georgia Prostitution Statute".

The questions raised by Appellant are so unsubstantial as not to warrant further argument as this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Michael M. v. Sonoma County Superior Court, ____ U.S. ____, 66 L.Ed2d 437 (1981). Appellant's argument ignores reality in that the Georgia pandering statute is only one of several statutes in a broad statutory scheme aimed at controlling prostitution and its adverse affects upon the "quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Paris Adult Theater I v. Slaton, 413 U.S. 49, 58 (1973). In order to control the problem of prostitution, the Georgia Legislature has enacted several statutes against: sodomy; solicitation of sodomy; fornication; public indecency; prostitution; pimping; keeping a place of prostitution; pandering by compulsion; and masturbation for hire. As noted by the Supreme Court of Georgia, in its opinion in this case, some of the above laws are gender based and others are not.

The Georgia pandering statute simply seeks to attack the problem of prostitution at its inception by imposing a sanction on males to deter the first step in the commission of the crime, and thereby reduce if not eliminate the market for the prostitute's illicit services.

The Georgia pandering statute is justified by this State's interest in controlling the quality of life in its urban centers, Paris Adult Theater I v. Slaton, supra, along with the interest of the State in preventing the crime of prostitution as defined in Ga. Laws 1968, pp. 1249, 1301 [Ga. Code Ann. § 26-2012]. The pandering statute by punishing the buyer of sex, in addition to the seller, discourages solicitation of females for prostitution and therefore is substantially related to the achievement of the objective of preventing prostitution. Additionally, the pandering statute serves the interest of the State in preventing women from becoming involved in prostitution and the interest of the State in assuring the safety of females in public places.

This appeal does not present a substantial federal question as this Court has upheld criminal laws which were attacked on equal protection grounds, even though the statutes were not gender neutral, when the statute has been shown to address a State objective in a reasonable manner. Michael M. v. Superior Court of Sonoma County, supra.

Further, the decision of the Supreme Court of Georgia in this case is not in conflict with any decision of this Court nor with a decision by a Federal Court of Appeals in this circuit, or with that of the highest State court in any other state.

B. THIS APPEAL RAISES A QUESTION NOT ADDRESSED BY APPELLANT UPON APPEAL TO THE SUPREME COURT OF GEORGIA AND IT SHOULD NOT NOW BE CONSIDERED.

Appellant for the first time upon appeal to this Court seeks to attack the pandering statute on the ground that it penalizes male buyers of commercialized sex more severly than prostitutes. Appellant acknowledges in his brief to this Court (See Appellant's statement of the case, p. 8) that he restricted his attack upon appeal to the Supreme Court of Georgia to the ground that the statute was not gender neutral.

As Appellant failed to timely raise the issue of "disparate punishment" it is respectfully submitted that it should not now be considered by this Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal from the judgment of the Supreme Court of Georgia in Fluker v. State, 248 Ga. 290 (1981).

Respectfully submitted,

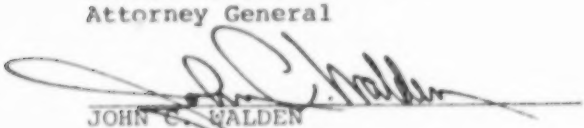
CHARLES E. BROWN
Assistant Attorney General

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

(Signatures continued)

MARION O. GORDON
Senior Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

CHARLES E. BROWN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-2976